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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
MARC SOBEL )  
 )  
Applicant for Certain Part 90 Authorizations )  
in the Los Angeles Area and Requestor of )  
of Certain Finder's Preferences )  
 )  
MARC SOBEL AND MARC SOBEL )  
d/b/a AIR WAVE COMMUNICATIONS )  
 )  
Licensee of Certain Part 90 Stations in the )  
Los Angeles Area )

WT DOCKET No. 97-56

To: The Commission

REVISED REQUEST  
FOR INQUIRY AND INVESTIGATION

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March 2, 1998

## TABLE OF CONTENTS

	Page
<b>I. INTRODUCTION</b>	<b>1</b>
<b>II. IMPROPRIETY AND BAD FAITH IN THE SOBEL PROCEEDING</b>	<b>3</b>
<b>A. Predesignation Irregularities and Improprieties</b>	<b>3</b>
<b>B. Seeking Revocation in Bad Faith and Without Sufficient Grounds</b>	<b>8</b>
(1) <u>Revocation Was Not Sought in Good Faith.</u>	9
(2) <u>Revocation Was Not Legally Justified.</u>	10
(3) <u>The Candor Issue was Prosecuted in Bad Faith.</u>	11
<b>III. DISCRIMINATORY TREATMENT OF SOBEL VIS-À-VIS KAY'S ENEMIES</b>	<b>13</b>
<b>A. Harold Pick</b>	<b>14</b>
(1) <u>Unlawful and Untimely License Reinstatement</u>	14
(2) <u>Misrepresentation and Falsification of Documents</u>	17
<b>B. James Doering</b>	<b>19</b>
<b>C. Liberty Paving, Inc.</b>	<b>21</b>
<b>D. Christopher C. Killian</b>	<b>22</b>
<b>IV. BUREAU MISCONDUCT IN THE KAY PROCEEDING</b>	<b>27</b>
<b>A. The Bureau's Prejudgment of Kay</b>	<b>28</b>
<b>B. The Bureau's Improper Efforts to Interfere With Kay's Business</b>	<b>30</b>
(1) <u>Improper Use of Section 308(b) Request</u>	30
(2) <u>The Thompson Tree Incident</u>	32
(3) <u>The Pro Roofing Incident</u>	35
<b>C. Use of Designation and Discovery as a Weapon Against Kay</b>	<b>38</b>
<b>D. The Bureau's Failure to Verify Accusations of Biased Informants</b>	<b>39</b>
<b>E. Coaching and Soliciting False Statements from Potential Witnesses</b>	<b>43</b>
<b>V. CONCLUSION</b>	<b>54</b>

## **SUMMARY**

Marc D. Sobel d/b/a AirWave Communications ("Sobel") respectfully petitions the Commission to conduct an investigation or, pursuant to Section 403 of the Communications Act of 1934, as amended, 47 U.S.C. § 403, into the facts and circumstances surrounding the designation and prosecution of the captioned proceeding.

The captioned proceeding and the ostensible investigation that preceded it were undertaken by the staff of the Wireless Telecommunications Bureau ("Bureau"), acting unlawfully, in bad faith, and with malice. Several irregularities, improprieties, and illegalities in the investigation, designation, and prosecution of WT Docket No. 97-56 call into serious question the good faith of the Bureau. Sobel has been discriminated against and treated severely vis-à-vis several other similarly situated licensees, each of whom is a complainant, informant, or potential witness against James A. Kay, Jr. ("Kay"), the Bureau's license revocation target in WT Docket No. 97-147. Sobel has been singled out for harassment and harsh treatment by the Bureau because of his friendship and business association with Kay. That the Bureau would engage in such retaliatory tactics is confirmed by numerous instances of improper and, in some cases, blatantly illegal conduct in connection with the Kay proceeding.

Sobel asks the Commission to conduct an investigation into the facts and circumstances surrounding the designation and prosecution of the captioned proceeding; to make Sobel a party to the investigation and afford him full discovery rights; and, upon conclusion of the investigation, to make findings and fashion appropriate relief.

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**WT DOCKET NO. 97-56**

To: The Commission

**REVISED\* REQUEST FOR INQUIRY AND INVESTIGATION**

Marc D. Sobel d/b/a AirWave Communications ("Sobel"), by his attorney and pursuant to Section 1.41 of the Commission's Rules and Regulations, 47 C.F.R. § 1.41, and the First Amendment of the Constitution of the United States,<sup>1</sup> hereby respectfully petitions the Commission to conduct an investigation or inquiry, pursuant to Section 403 of the Communications Act of 1934, as amended, 47 U.S.C. § 403, into the facts and circumstances surrounding the designation and prosecution of the captioned proceeding.

**I. INTRODUCTION**

1. The captioned proceeding and the ostensible investigation that preceded it were undertaken by the staff of the Wireless Telecommunications Bureau ("Bureau"), acting

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\* This document supersedes in its entirety the *Request for Inquiry and Investigation* filed on Friday, February 27, 1998. In addition to including the referenced exhibits, several editorial and typographical corrections and other revisions have been made. The changes affect pagination and the numbering of some footnotes and paragraphs.

<sup>1</sup> The First Amendment guarantees, among other liberties, "the right of the people ... to petition the government for a redress of grievances." U.S. CONST. amend. I.

unlawfully, in bad faith, and with malice. Several irregularities, improprieties, and illegalities in the investigation, designation, and prosecution of WT Docket No. 97-56 call into serious question the good faith of the Bureau. Sobel has been discriminated against and treated severely vis-à-vis several other similarly situated licensees, each of whom is a complainant, informant, or potential witness against James A. Kay, Jr. ("Kay"), the Bureau's license revocation target in WT Docket No. 97-147. Sobel has been singled out for harassment and harsh treatment by the Bureau because of his friendship and business association with Kay. That the Bureau would engage in such retaliatory tactics is confirmed by numerous instances of improper and, in some cases, blatantly illegal conduct in connection with the Kay proceeding.

2. These are serious charges, and Sobel does not make them lightly. The detailed factual allegations set forth herein are supported by substantial proof in the form of sworn testimony, declarations, and virtually irrefutable documentary evidence. The gravity of these allegations and the compelling nature of the evidence presented in support require that the Commission immediately commence a thorough investigation into this matter. Sobel asks that he be made a party to the investigation and be afforded full discovery rights. Upon conclusion of the inquiry, the Commission should fashion appropriate relief to redress the violations of Sobel's procedural, substantive, and civil rights.<sup>2</sup>

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<sup>2</sup> On January 12, 1998, Sobel submitted his *Consolidated Brief and Exceptions* in this proceeding seeking Commission review and reversal of the *Initial Decision of Administrative Law Judge John M. Frysiak* ("Initial Decision"), FCC 97D-13, released November 28, 1997. Sobel does not intend to reargue the merits of that appeal. It is not possible, however, to address the matters submitted herein without touching on at least some of the substantive issues in that appeal. Sobel is nonetheless compelled to present these matters now as a prerequisite to seeking judicial relief and compensation for violation of his civil rights should the Commission not take appropriate corrective action.

## **II. IMPROPRIETY AND BAD FAITH IN THE SOBEL PROCEEDING**

3. The conduct of the Bureau in connection with the pre-designation investigation (or lack thereof), the designation of the hearing itself, and the subsequent prosecution of this case are characterized by irregularities, departure from applicable precedent, and failure to conform to applicable legal requirements. Some of the matters discussed in this section may not, of themselves, initially appear to warrant the level of concern expressed by this request. Taken as a whole, however, and especially when considered in conjunction with the additional matters presented in Sections III and IV, below, they readily justify and vindicate Sobel's position.

### **A. Predesignation Irregularities and Improprieties**

4. Some time in early 1994 the Bureau, without prior notice or subsequent explanation, ceased processing all of Sobel's pending applications and requests. It was later learned that the apparent reason for this was the mistaken belief on the part of the Bureau that Sobel was not a real individual, but rather a fictitious name allegedly being used by Kay to thwart Commission processes. Sobel first became aware of this in late September or early October 1994 when he learned of a draft designation order the Bureau had prepared seeking revocation of Kay's licenses. Exhibit MDS-1 is a copy of the draft order. It contains the following statement: "Information available to the Commission also indicates that James A. Kay, Jr. may have conducted business under a number of names. Kay could use multiple names to thwart our channel sharing and recovery provisions . . . . We believe these names include . . . AirWave Communications [and] Marc Sobel, d/b/a AirWave Communications."

5. Upon learning this, Sobel wrote to the Bureau in an attempt to clarify matters. Exhibit MDS-2 is a copy of Sobel's December 6, 1994, letter sent by Sobel to Mr. Gary Stanford of the FCC staff in Gettysburg, Pennsylvania. The Bureau ignored this letter. Over the years up to

that point, several FCC licenses had been issued to Sobel, and the Bureau thus had contact information (address and telephone number) that was distinct and separate from Kay's. The Bureau now had a recent letter directly from Sobel specifically stating that he was a separate business entity from Kay. Nonetheless, the Bureau never once attempted to contact Sobel to confirm or deny its erroneous assumption that Sobel was a false alias of Kay. Instead, the Bureau proceeded to release the Kay designation order, including in it exactly the same inaccurate statement that had been in the earlier draft. *WT Docket No. 94-147, James A. Kay, Jr., Order to Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture ("Kay HDO")*, 10 FCC Rcd 2062 at ¶ 2 (1994). Appendix A to the *Kay HDO* was a list of 164 licenses the Bureau believed to be held by Kay. This list included eleven licenses issued to Marc Sobel.

6. The Bureau recognized early on that the *Kay HDO* contained two patently false statements about Sobel, namely, that Sobel was a Kay alias and that Kay held the eleven Sobel licenses. The Bureau surely must be deemed obligated to provide the Commission with accurate information and to correct any errors when found. Nonetheless, the Bureau allowed these false statements—statements that the Bureau itself had placed into the designation order without any effort at verification—to remain uncorrected for over two years. The Bureau first acknowledged the error in its *Supplement to Motion for Summary Decision and Order Revoking Licenses* (February 23, 1996) and in its *Wireless Telecommunications Bureau's Request for Certification* (March 6, 1996). But even then the Bureau's interest was not justice or even truth; rather, the Bureau was motivated by litigation tactics. It wanted a summary decision revoking Kay's licenses, but it then had to contend with the fact that not all of the licenses subject to the desired order were Kay's, and the real licensees had not been duly processed. So, the Bureau requested

the presiding judge in the Kay proceeding to certify to the Commission the question whether to modify the Kay HDO to delete the Sobel call signs. The Commission did so on May 7, 1996. *James A. Kay, Jr.*, 11 FCC Rcd 5324 (1996). Had removal of Sobel's call signs from the Kay proceeding not been procedurally convenient to the Bureau's litigation tactics against Kay, the Bureau likely would have been content to allow the false statements to remain to this day.

7. For more than a year prior to the designation order in the above-captioned proceeding, Sobel repeatedly and continuously requested a statement of the Bureau's concerns and an opportunity to address them informally. Sobel volunteered to travel from California to either Washington, D.C. or Gettysburg to meet with Bureau staff, to provide any required information, and to be apprised of the nature of any concerns and how they might be resolved. After finally acknowledging the erroneous inclusion of Sobel's licenses in the *Kay HDO*, Bureau staff advised counsel for Sobel that the issue of Sobel's pending matters would be addressed after the Commission removed Sobel from the Kay proceeding. On May 7, 1996, the Commission removed Sobel's licenses from WT Docket No. 94-147, expressly stating, "there is no reason at this time to subject [Sobel] to possible sanctions." *James A. Kay, Jr.*, 11 FCC Rcd 5324, 5324 (1996) (emphasis added). But Bureau staff reneged on the promise to counsel for Sobel, and continued to withhold action on any of Sobel's pending matters and steadfastly refused to provide Sobel with a statement of its concerns or to meet with him in an attempt to discuss and resolve them.

8. Sobel was so frustrated that he eventually sought judicial relief. Exhibit MDS-3 is a copy of Sobel's *Petition for Writ of Mandamus* filed with the United States Court of Appeals for the District of Columbia Circuit on September 24, 1996 in Case No. 96-1361. Sobel asked the Court to compel the Commission "to immediately resume processing [Sobel's pending



applications] ... or to provide Sobel with a detailed statement of the reasons" for its continued inaction. Exhibit MDS-3 at p. 9. Sobel also requested that he be given "a meaningful opportunity to respond" prior to the designation of any hearing. *Id.* at 10.

9. In reaction to the mandamus request, and without prior notice to Sobel, the Bureau arranged for the adoption of a hearing designation order seeking disqualification of Sobel and the revocation of all his licenses. *WT Docket No. 97-56, Marc D. Sobel, Order to Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing and for Forfeiture ("Sobel HDO")*, 12 FCC Rcd 3298 (February 12, 1997). In the Commission's January 27, 1997 response to the mandamus request<sup>3</sup> it was revealed that the Bureau had presented to the Commission an item addressing the Sobel matter, but neither the nature of the item nor what action it recommended was disclosed, further concealing information and accusations from Sobel. On January 31, 1997, Sobel wrote directly to the Commissioners and the Chief of the Bureau, requesting that:

prior to acting on the staff recommendation before you, whatever it may be, you first give Mr. Sobel an opportunity to come forward and to hear first hand what the Bureau staff's concerns are. Mr. Sobel will use his best efforts to answer all questions, and to reach a mutually satisfactory resolution of the matter. Mr. Sobel is prepared to come to Washington on short notice to meet with you, your staff, or any other Commission personnel necessary to advance this matter.

Exhibit MDS-4 at p. 3. Sobel's request was ignored for several days, despite repeated telephone calls to the Bureau Chief's office.

10. On or after February 6, 1997, Bureau counsel telephoned counsel for Sobel stating that Bureau staff would be willing to meet, but that there was little to discuss insofar as the Commission had already adopted a hearing designation order. It was through this telephone call

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<sup>3</sup> *FCC Opposition to Petition for Writ of Mandamus* filed with the United States Court of Appeals for the District of Columbia Circuit on January 27, 1997 in Case No. 96-1361.

that Sobel learned for the first time that Bureau was seeking revocation of Sobel's licenses because of an alleged unauthorized transfer of control to Kay.<sup>4</sup>

11. Sobel again wrote to the Commissioners on February 11, 1997, asking that public release (and hence effectiveness) of the *Sobel HDO* be deferred to provide a pre-hearing opportunity to resolve the matter. Exhibit MDS-5. In that letter Sobel recounted his previous unrequited efforts to learn the Bureau's concerns so he might address them, and pleaded yet again for an opportunity resolve the matter informally before rushing straight from first accusation to designation for revocation with no intervening steps:

I had assumed, perhaps incorrectly, that when the Commission staff raises questions about a licensee, the appropriate response is for the licensee to cooperate with the Commission in an effort to understand the concern and take whatever corrective measures may be indicated. But the Bureau's unwillingness to deal informally with Mr. Sobel would tend to indicate that the more prudent course would be to adopt a defensive posture, being entirely uncooperative from the first sign of trouble, on the theory that the only way out of the situation is through an adjudicative hearing in which staff will be an adversary party. Surely this is not a message the Commission wishes to send.

It is a mystery why the Bureau would insist on rushing straight to a hearing when Mr. Sobel has repeatedly expressed a willingness to cooperate and share information and a desire to meet in an effort to reach an informal resolution of any matters of concern to the Bureau. One would expect this to be a far more preferable avenue, and certainly one that should at least be explored before going to a hearing. We therefore urge you to defer the effectiveness of any designation order and to direct your staff to work with Mr. Sobel toward an informal resolution of this matter.

Exhibit MDS-5 at p. 2.

12. The *Sobel HDO* was released the next day, February 12, 1997. Only then did Bureau staff agree to meet with counsel for Sobel, but at that meeting the Bureau took the position that Section 1.93(b) of the Commission's Rules, 47 C.F.R. § 1.93(b), precluded any

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<sup>4</sup> Sobel anticipated, but sought to avoid, a possible hearing pursuant to Section 309 of the Communications Act. The designation of a hearing pursuant to Section 312 came as a complete surprise. The Bureau had theretofore given Sobel no indication whatsoever that he was suspected of having done anything warranting license revocation.

possibility of a resolution without hearing because basic qualifications issues had been designated against Sobel. For more than a year the Bureau ignored or refused Sobel's continuous and repeated requests for a specific statement of the charges against him and an opportunity to respond or resolve matters. The Bureau eventually agreed to a meaningless after-the-fact meeting at which it then pointed to the *HDO*, the fact and timing of which the Bureau had orchestrated,<sup>5</sup> as an excuse for not dealing with Sobel. The combination and timing of these actions and inactions demonstrate bad faith on the part of Bureau staff.<sup>6</sup>

**B. Seeking Revocation in Bad Faith and Without Sufficient Grounds**

13. The most obvious example of irregularity and impropriety in this proceeding is the *Sobel HDO* itself. The Bureau obtained from the Commission an order seeking the disqualification of Sobel, the denial of all his pending applications (including renewals), and the revocation of all his licenses. The sole basis for such harsh regulatory sanction was the allegation that a management agreement between Sobel and Kay constituted an unauthorized transfer of control in violation of Section 310(d) of the Communications Act, 47 U.S.C. § 310(d). But there is ample reason to doubt that the Bureau sincerely believed there had been a transfer of control

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<sup>5</sup> The Bureau has a role in the public release and Federal Register publication of orders it has recommended to the Commission for adoption. Sobel suspects, but of course can not prove, that the Bureau (a) expedited the release of the designation order (or at least made no effort to delay it) prior to any opportunity for the Commission to respond to Sobel's February 11 letter, and (b) delayed Federal Register publication to give itself additional time to move for enlargement of issues. *See Motion for Special Relief*, filed by Sobel in the above-captioned proceeding on May 5, 1997.

<sup>6</sup> In addition to raising questions whether this proceeding was initiated in good faith, the Bureau's actions in designating the hearing also violated Sobel's prior notice and opportunity to correct rights under Section 9(b) of the Administrative Procedure Act, 5 U.S.C. § 558(c), and whether the Bureau has violated Sobel's Constitutional Rights, including his right to equal protection under the law, by discriminating against Sobel vis-à-vis parties adverse to Kay. Sobel has already presented his APA argument, *see Sobel's Consolidated Brief and Exceptions* at pp. 6-9, and will not repeat it here. The discrimination against Sobel is described in detail in Section III of this pleading.

and was simply using this as a "hook" to go after Sobel. Even assuming it had a bona fide belief that an unauthorized transfer of control had occurred, the Bureau nonetheless acted in bad faith and contrary to established precedent by seeking revocation of Sobel's licenses on that basis. Finally, the Bureau's post-designation prosecution of a misrepresentation and lack of candor issue against Sobel is marked by similar questions as to the Bureau's bona fide belief and good faith.

(1) Revocation Was Not Sought in Good Faith.

14. When it arranged for the *Sobel HDO*, as when it earlier arranged for the removal of Sobel's call signs from the Kay proceeding, the Bureau was manipulating the process to suit its own litigation strategy rather than acting out of good faith belief that Sobel was actually guilty of the wrong alleged. From the time the Commission adopted the *Kay HDO* to the time it removed Sobel's call signs from that proceeding, the Bureau gave no indication that it even suspected an unauthorized transfer of control from Sobel to Kay. The *Kay HDO* did not: (a) name Sobel as a party, (b) allege a transfer of control (by virtue of a business relationship between Sobel and Kay or otherwise), or (c) designate an unauthorized transfer of control or a real party-in-interest issue. The *Kay HDO* in fact assumed that Sobel was a false alias used by Kay for untoward purposes. The eleven Sobel's licenses were included not on the theory that control had been transferred to Kay, but rather "because information indicated that Kay may have conducted business under a number of names." *James A. Kay, Jr.*, 11 FCC Rcd at 5324.

15. If between May 7, 1996 (when the Commission expressly stated "there is no reason at this time to subject [Sobel] to possible sanctions," *id.*, and February 7, 1997 (when the Commission adopted the *Sobel HDO*), the Bureau discovered new evidence of an unauthorized transfer of control, it was never revealed during discovery or at the hearing. The sole basis for

the alleged transfer of control cited in the *Sobel HDO* was an agreement between Sobel and Kay which the Bureau had in its possession for two years prior to the *Sobel HDO*. Kay had produced a copy of the management agreement on March 24, 1995. *Kay's Responses to Wireless Telecommunications Bureau's First Request for Documents* in WT Docket No. 94-147. The Bureau arranged for the *Sobel HDO* not because it sincerely believed there had been a disqualifying unauthorized transfer of control, but only because the judicial mandamus action made it impossible for the Bureau to continue any longer its unlawful unilateral freeze on all of Sobel's pending matters.

(2) Revocation Was Not Legally Justified.

16. Assuming arguendo the Bureau sincerely believed there had been an unauthorized transfer of control, it overreacted by seeking total disqualification and revocation as a sanction, further showing its bias and bad faith toward Sobel. An unauthorized transfer of control is not grounds for disqualification in the unless coupled with an intent to deceive or other disqualifying conduct. *E.g., Deer Lodge Broadcasting, Inc.*, 86 FCC 2d 1066 at ¶¶ 63-67 (1981); *Blue Ribbon Broadcasting, Inc.*, 90 FCC 2d 1023 at ¶¶ 7-9 (Rev. Bd. 1982); *Silver Star Communications - Albany, Inc.*, 3 FCC Rcd 6342 at ¶¶ 52-58 (Rev. Bd. 1988), *aff'd* 6 FCC Rcd 6905 at ¶¶ 13-20 (1991); *Roy M. Speer*, 11 FCC Rcd 18393 at ¶ 88 (1996). While this principal evolved in broadcast cases, it applies equally in the wireless services. *Brian L. O'Neill*, 6 FCC Rcd 2572 at ¶ 30 (1991); *Century Cellunet of Jackson MSA Limited Partnership*, 6 FCC Rcd 6150 at ¶ 8 (1991); *Catherine L. Waddill*, 8 FCC Rcd 2710 ¶ 19 (1993).

17. The Commission's typical response to unauthorized transfers is to require them to be undone. *E.g., Ellis Thompson*, 3 FCC Rcd 3962 (Mob. Serv. Div. 1988) (cellular application granted conditioned on removal from an agreement a paragraph potentially conferring control on

a third party), *affirmed on recon.*, 4 FCC Rcd 2599 (Com. Car. Bur. 1989), *affirmed on review sub nom. Ellis Thompson Corp.*, 7 FCC Rcd 3932 (1992), *reversed on other grounds sub nom. Telephone and Data Systems, Inc. v. FCC*, 19 F3d 42 (D.C. Cir. 1994); *Petroleum V. Nasby Corp.*, 10 FCC Rcd 6029 (Rev. Bd. 1995), *recon. granted in part*, 10 FCC Rcd 9964 (Rev. Bd. 1995) (renewal and belated approval of an unauthorized transfer of control issued subject to a divestiture condition), *remanded on other grounds*, 11 FCC Rcd 3494 (1996). When a sanction is imposed, it is a forfeiture, not license revocation. *E.g., Rasa Communications Corp.*, 11 FCC Rcd 13243 (1996); *Kenneth B. Ulbricht* (DA 96-2193; December 31, 1996); *Galesburg Broadcasting Co.*, 6 FCC Rcd 2210 (1991); *The Hinton Telephone Co.*, 6 FCC Rcd 7002 (1991), *forfeiture reduced*, 7 FCC Rcd 6643 (1992). *See also, Forfeiture Policy Statement*, 12 FCC Rcd 17087 (1997).

18. Attacking a licensee's character qualifications and seeking license revocation on insufficient grounds and contrary to applicable precedent is conduct the Commission certainly would not tolerate from a private party. "No licensee may lightly place in question the character qualifications of another licensee." *Television Broadcasters, Inc.*, 1 FCC 2d 970 at ¶ 14 (1965). The Bureau must be held to at least as high a standard of good faith. In this case, the Bureau fell far short of the mark.

(3) The Candor Issue was Prosecuted in Bad Faith.

19. After designation of this proceeding, Sobel sought to discover information going to his good faith. When the Bureau objected on relevance grounds, Sobel, citing much of the same authority referenced in paragraph 16 of this pleading, above, countered that the requested information was relevant because the license revocation sanction sought by the Bureau could not be imposed solely for the alleged unauthorized transfer of control in the absence of a showing of

deceptive intent or other violations or bad faith by Sobel. *Sobel's Response to the Bureau's Objections to Requests for Admission* at 2-3 & n.3 (March 27, 1997). Exactly one week later, the Bureau for the first time charged Sobel with misrepresentation and lack of candor. *Wireless Telecommunications Bureau's Motion to Enlarge Issues* (April 3, 1997).

20. The timing of the motion to enlarge raises obvious questions about the Bureau's good faith in bringing it, but there are additional indications that the Bureau sought addition of the issue without a sincere belief that Sobel had acted with deceptive intent, or even that there was any misstatement of facts. The theory of the Bureau's assertion is that affidavits executed by Sobel in January of 1995 are inconsistent with, and therefore attempt to conceal or misrepresent, the written agreement between Sobel and Kay. But the affidavits were given to the Bureau in January of 1995, and the written agreement was produced in March of 1995. Both sat together in the Bureau's possession for more than two years, yet the Bureau did not seek a candor issue when it recommended the *Sobel HDO* to the Commission. Nor did the Bureau, in all of that time, seek to add misrepresentation or lack of candor issues in the Kay proceeding.

21. Once again, we see the Bureau acting without regard to the truth, and even without regard to its own good faith belief, but rather motivated solely and exclusively by litigation tactics. It appears that the Bureau staff long ago charted a determined course aimed at sinking Kay (an assertion that will be demonstrated and supported in Section IV, below). It appears further that neither truth, justice, nor established legal precedent are sufficient to change its course or slow the speed. Unfortunately, Mr. Sobel has been caught in the wake of the Bureau's quest to make Kay walk the regulatory plank.

### III. DISCRIMINATORY TREATMENT OF SOBEL VIS-À-VIS KAY'S ENEMIES

22. Sobel has been singled out for discriminatory treatment because of his personal and business relationship with Kay. Meanwhile, those who complain, inform, or testify against Kay are afforded favored treatment.<sup>7</sup> Substantial or even conclusive proof of their serious wrongdoing is ignored by the Bureau, while Sobel is subjected to stringent scrutiny and harsh enforcement sanctions.

23. During discovery and other pre-hearing procedures in WT Docket No. 94-147, the Bureau disclosed the identity of many of the pre-designation complainants and informants against Kay as well as the potential hearing witnesses against Kay. Kay learned of others through Freedom of Information Act Requests, in connection with civil litigation, and by other means. Many of those individuals are competitors of Sobel and Kay who themselves have licensing matters and other business before the Commission. The Bureau has repeatedly and consistently ignored and refused to act on documented and often conclusive showings of impropriety and illegality by such anti-Kay entities. In many such cases the Bureau simply turns a blind eye on conclusively demonstrated wrongdoing far worse than Sobel has been merely accused of.

24. The Commission and its staff enjoy some degree of "prosecutorial discretion" in their enforcement actions. But it is a blatant abuse of discretion for the Bureau to discriminate in

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<sup>7</sup> The Bureau's constant and blatant discrimination against Sobel is so manifest that it apparently has poisoned the impartiality of the presiding judge in WT Docket No. 94-147. In an *Order* (FCC 98M-22), adopted February 26, 1998, Administrative Law Judge Richard L. Sippel ruled, *sua sponte*, that Sobel and his brother, non-parties in WT Docket No. 94-147 who may be called by the Bureau as adverse witnesses, must endure the inconvenience of traveling from Los Angeles to Washington, D.C. to testify, while anti-Kay witnesses are being catered to with a special field hearing session to be held in Los Angeles. The presiding judge offered no explanation for this curious ruling, and the only distinction between Sobel and his brother vis-à-vis the witnesses being spared coast-to-coast travel is that Sobel and his brother are deemed friendly to Kay.



its enforcement activities on the basis who is for and who is against Kay. The Bureau has imposed one set of onerous rules on Sobel, and a different favorable set of rules applies to Kay's enemies. In the following pages we detail but a few examples of such unlawful and unconstitutional discrimination.

**A. Harold Pick**

25. One of the primary complainants and informants against Kay is one Harold R. Pick ("Pick"). He was identified by the Bureau in discovery as one having personal knowledge of alleged malicious interference by Kay, and documents obtained from the Bureau either through discovery or FOIA requests include numerous *ex parte* complaints against Kay by Pick. Although Pick was not identified as a potential witness in the Kay hearing, the Bureau obtained a sworn statement from him in preparation for hearing. It is well known to Bureau staff that Pick is one of Kay's biggest enemies, and that Pick and Kay are competitors and adverse parties in numerous contested matters pending before the Bureau. The Bureau has repeatedly afforded favorable treatment to Pick, unlawfully taking actions favorable to him, and refusing to take appropriate enforcement actions against him. The Bureau ignores repeated *ex parte* violations by Pick, and even takes actions favorable to him in response to *ex parte* requests involving contested matters. The matters discussed below are but two examples of this discriminatory treatment.

**(1) Unlawful and Untimely License Reinstatement**

26. In connection with proceedings arising out of a petition for bankruptcy filed by Pick, on May 12, 1995, the United States Bankruptcy Court for the Central District of California issued an Order Authorizing Chapter 7 Trustee to Sell Assets of the Estate in Case No. LA93-38738LF ("*Bankruptcy Order*"). The *Bankruptcy Order* authorized the trustee to sell the assets,

including WNZB276 and WNZB262, to Kay or his assignee. For consideration received, the trustee executed and caused to be filed with the Commission FCC Forms 405A requesting cancellation of the authorizations. According to Commission records, of which official notice may be taken, the authorizations were in fact canceled and the call signs purged from the FCC's license database. This occurred no later than September 21, 1995 for WNZB276 and no later than October 17, 1995 for WNZB262. In February of 1995, however, more than four months after the action canceling the licenses and purging them from the database, the Bureau inexplicably reinstated the authorizations. There was no public notice of this action, no actual notice to the trustee, and attempts to obtain an explanation from Bureau staff proved unfruitful. Accordingly, petitions for reconsideration were presented to the Bureau.

27. Pursuant to the *Bankruptcy Order*, the trustee had the legal and judicially conferred right to cause the licenses to be canceled or assigned to its designee. Prior to submitting the FCC Form 405A, counsel for the bankruptcy trustee contacted Bureau staff to inquire about appropriate procedure and provided Bureau staff with a copy of the Order. Bureau staff provided the trustee with the requisite FCC Forms 405A and with a certified list of the licenses held by Harold Pick. The trustee followed the procedures suggested by Bureau staff. Thus, the cancellations were within the rights of the trustee, in full accordance with Commission procedure, and were pursued in good faith.

28. The Bureau's inexplicable reinstatement of the authorizations was clearly unlawful. Section 1.113(a) of the Commission's Rules provides that an action taken under delegated authority may be set aside *sue sponte* by such designated authority only within thirty days of the action. 47 C.F.R. § 1.113(a). The reinstatements in this case came more than four months after the actions canceling the licenses. Moreover, there was no notice to the trustee.

There is no evidence in the public record that any party timely submitted a petition for reconsideration or an application for review within 30 days of the cancellations, and if any such petition was filed, it was not served on trustee as required by Commission Rule. The only possible explanation, therefore, is that there were informal communications between Pick and Bureau staff leading to the reinstatement. If this is the case, then both Pick and Bureau staff engaged in a blatant violation of the Commission's *ex parte* rules as well as an unlawful interference with Kay's and the trustee's rights under the *Bankruptcy Order*.

29. It was informally learned that the apparent theory for the Bureau's unexplained and unlawful actions was a then-pending appeal of the *Bankruptcy Order* by Pick. This did not justify the actions however. The *Bankruptcy Order* was then, is now, and at all relevant times has remained, in full force and effect and has been neither stayed nor set aside by any judicial authority. Section 405(a) of the Communications Act, 47 U.S.C. § 405(a), and Section 1.106(n) of the Commission's Rules, 47 C.F.R. § 1.106(f), provide that a Commission or staff action remains in full force and effect pending any reconsideration or review absent a specific order of stay. If a petition for reconsideration within the Commission does not automatically stay a staff action, it would be ironic indeed if an appeal in a judicial matter entirely unrelated to the Commission were deemed to do so. In any event, Pick's appeal of the *Bankruptcy Order* is no longer pending. On April 14, 1997 the United States Court of Appeals for the Ninth Circuit issued an Order in Case No. 96-56777 dismissing Pick's appeal for failure to prosecute.

30. Kay, along with the trustee and a third-party beneficiary sought reconsideration of the Bureau's unlawful action in March of 1995. The petitioners were served with no response from Pick, yet the Bureau still had not acted on them over two years later when, on May 30, 1995, Kay filed an application for review seeking Commission relief from the Bureau's inaction.

Exhibit HP-1. To date there has been no action on the application for review. As the Commission is aware, the Bureau is responsible for recommending disposition of applications for review of non-hearing delegated authority actions, so responsibility for continued lack of action on this matter still rests with the Bureau.

31. The contrast between the Bureau's treatment of Pick and Sobel is striking. The Bureau froze processing on all of Sobel's applications without explanation, and when Sobel repeatedly pressed for an explanation he was ignored. When Sobel sought judicial relief from the Bureau's inaction, the Bureau retaliated by subjecting Sobel to an unwarranted revocation proceeding. But when it comes to Pick, the Bureau will take favorable action, on the basis of *ex parte* communications from Pick, even where that action is precluded by statute.

(2) Misrepresentation and Falsification of Documents

32. The Bureau's favorable treatment of Harold Pick goes far beyond the discriminatory disregard of statutorily imposed processing requirements and time limits. The Bureau has ignored and refused to act on conclusive evidence that Pick gave a false affidavit to the Commission and even went so far as to falsify documents submitted to the Commission in support of his false declaration.

33. In the course of one of Sobel's pending finder's preference proceedings, FCC File No. 93F600, Sobel presented to the Bureau conclusive evidence that Harold Pick and his now deceased father, Gerard Pick, lied to the Commission regarding the date on which a station had been placed into operation and also falsified documents and presented them to the Commission in an attempt to support the lie. Specifically, in support of their assertion that a challenged station had been timely constructed, the Picks falsified and then submitted invoices purporting to show that crystals for the stations had been purchased before the construction deadline.

34. In a sworn statement submitted to the Commission on June 23, 1993, Harold Pick stated, under penalty of perjury: "The repeater was installed on Oat Mountain 15 January 1993 at 2:00 PM, frequency 854.08750 MHz." Exhibit HP-2. Sobel filed his *Supplement to Opposition to Petition for Reconsideration* on October 20, 1994, Exhibit HP-3, in which he presented conclusive evidence that Harold Pick's sworn statement was false and that Gerard Pick had also submitted falsified documents in support of Harold's lie. Specifically, Gerard Pick filed what purported to be an invoice showing that the crystals for 809/854.08750 MHz, the frequency recited in Harold Pick's false declaration, had been purchased on January 1, 1993. Sobel demonstrated, however, that this was a counterfeit. The Picks had cut off the bottom half of an invoice for the crystals and pasted it to the top half of a different invoice bearing the January 1, 1993, date. The genuine invoice showed that the crystals were not even ordered until February 4, 1993, and that they were picked up and signed for by Harold Pick on February 9, 1994. The Picks never responded to this conclusive showing of misrepresentation, lack of candor, and falsification of documents with intent to deceive, and the Bureau seems not to care.

35. The Bureau's discrimination against Sobel vis-à-vis Pick could not be more striking. In the captioned proceeding the Bureau seeks to hold Sobel responsible for misrepresentation and lack of candor based on disputed interpretations of what was intended by the use of words such as "interest" and "employee" in an affidavit. In the case of Pick's affidavit, there is nothing to interpret. He stated that the station was constructed on one date, but his own signature on invoices shows that it was constructed on an entirely different date. In the captioned proceeding the Bureau also seeks to attribute deceptive intent to the fact that irrelevant and immaterial information was redacted from attachments submitted to the Commission by Sobel along with responses to application return notices. But the Bureau remains untroubled by the

uncontroverted showing that the Picks falsified highly pertinent information on documents tendered to the Commission, all for the purpose of supporting Harold Pick's blatantly false sworn statement.

36. The Bureau is willing to give Pick a pass on having committed perjury and forged documents, simply because Pick is willing to point an accusing finger at Kay. Sobel, on the other hand, because he is an associate of Kay, is unreasonably forced to justify every possible nuance of meaning of each word in an affidavit, even in the absence of any evidence whatsoever of deceptive intent.

**B. James Doering**

37. Another complainant and informant against and competitor of Kay, James Doering, has also been demonstrably shown to have engaged in disqualifying behavior. Nonetheless, the Bureau has taken no action whatsoever against him. On May 30, 1997, United Corporation of Southern California ("UCSC") and Kay jointly filed a *Formal Complaint* against Doering and Pick. Exhibit JD-1. Other than their joint participation in this complaint, UCSC and Kay are not otherwise affiliated. The *Formal Complaint* demonstrated conclusively that Doering had, *inter alia*, filed with the FCC an assignment of license application which he knew or should have know contained false statements and falsified documents. Specifically, the application included an FCC Form 1046 by which Robert L. Springfield, the President and sole shareholder of UCSC, was purported to have executed on September 19, 1995, and designating "Jim Doering d/b/a J. Doering Communications" as the assignee. The assignment application also included a certification letter with a conformed signature, the original ostensibly having been signed by Springfield on September 20, 1995.

38. Springfield was out of the country on a cruise on the dates that he purportedly signed the FCC Form 1046 and the certification of construction. He never saw, reviewed, or signed anything like the certification letter, and in fact had no personal knowledge of most of the statements attributed to him therein. He had once much earlier signed an FCC Form 1046 with the intention of, assigning his station to Harold Pick subject to a specified business arrangement, but Pick never filed the application. He never signed anything assigning the license to Doering, nor did he have any agreement or understanding with Doering. Indeed, until shortly before he filed the *Formal Complaint*, Springfield had never met or heard of Jim Doering. Nonetheless, Doering filed and prosecuted the application, falsely representing it to be a voluntary assignment of the license from UCSC to Doering. Doering knew this was not the case, and he also knew or should have known that the application contained false statements and forged or falsified documents.

39. Although not required to do so prior to service by the Bureau, Doering responded to the complaint, but he was unable to deny any of the operative facts. He essentially admits that he inserted his name as assignee and the false execution date on a Form 1046 *after* it had been signed by Springfield in blank. He does not dispute Springfield's statement that he never saw nor signed the certification letter and had no knowledge of the representations contained therein, but pleads ignorance at how such a falsified document came to be included in his application. Notwithstanding the conclusive evidence presented in the complaint and Doering's inability to deny it, the Bureau has taken absolutely no action against Doering. The Bureau has not even formally served the complaint. Meanwhile, on information and belief, Doering has entered into

an agreement with Nextel to sell by cancellation<sup>8</sup> the authorization he wrongfully and fraudulently converted from UCSC.

40. The pattern is becoming clear. Sobel, because he is friends with Kay, has his applications and filings placed in processing deep freeze. When he complains loud and long enough, he is examined by the Bureau with an enforcement microscope and placed in a revocation proceeding where he must fight for his regulatory life. Meanwhile, Doering is given free reign to steal licenses, misrepresent, and falsify applications right under the Bureau's nose, and then negotiate with Nextel for potential profit on his ill-gotten goods. The only apparent explanation for such disparate treatment is that Doering, unlike Sobel, is willing to say the bad things about Kay that the Bureau wants to hear.

**C. Liberty Paving, Inc.**

41. On January 10, 1997, Sobel wrote to the Bureau regarding a co-channel licensee, Liberty Paving, Inc. ("Liberty"). Exhibit LP-1. Sobel informed the Bureau that Liberty's facility had discontinued operation and had been off the air for more than a year, and he requested its cancellation in accordance with 47 C.F.R. § 90.157. Sobel presented conclusive evidence supporting his contention, namely, a transcript of a deposition in which Charles F. Barnett, President of Liberty, testified under oath that the radios his company had been using pursuant to the license were taken out of service in the fall of 1994. In August of 1994 Liberty contracted for service on Nextel's new 800 MHz digital system. Liberty traded the old radios in for a credit of \$100 each. The old radios were taken away by the technicians who installed the new Nextel

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<sup>8</sup> In the Part 90 radio services where channels are often shared by multiple licensees in the same area, one licensee may, rather than purchasing a co-channel authorization, simply contract with the co-channel licensee to cancel its authorization, thereby freeing up capacity on the channel and possibly giving the remaining licensee exclusive status.



radios in Liberty's vehicles. Mr. Barnett further testified that his company has not used the old radios or any radio system other than Nextel's since that time. Mr. Barnett's service with Nextel began sometime in August-September of 1994.

42. Sobel had thus presented the Bureau with an open-shut case of automatic cancellation pursuant to Section 90.157 of the rules, and Sobel was entitled to have the Liberty authorization canceled and purged from the database. Nine months later the Bureau had taken no action, so on September 2, 1997, Sobel renewed his request. Exhibit LP-2. Both of Sobel's letters remain unanswered to this day. Moreover, on information and belief, Barnett has engaged in discussions regarding possible sale of the authorization.

43. Barnett has been identified by the Bureau as one with information regarding alleged wrongdoing by Kay and as a potential witness against Kay. But the Bureau is concerned less with Barnett's candor than his willingness to implicate Kay. Exhibit LP-3 is an excerpt from the transcript of a recent deposition of Barnett in connection with WT Docket No. 94-147.

Barnett admits that he lied when he wrote to the Bureau telling them he had a tape recording in which Kay allegedly incriminated himself. Barnett further admits that he made the false statement for the express purpose of possibly influencing the Commission to reinstate one of his canceled licenses. Once again we see the Bureau unabashedly subjecting Sobel to a harsh double standard. The possible subjective meaning of Sobel's use of terms like "interest" and "employee" were subject to microscopic scrutiny in an effort to justify the Bureau's baseless claim that Sobel lacked candor. By contrast, Barnett uttered the black-and-white objective lie that he has a tape recording which he in fact did not have, he admitted he knew the statement was false when he made it, and he admitted that he made it to influence a Commission action. The Bureau nonetheless continues to put Barnett forward as a credible witness against Kay. Moreover, in